Note

A Closer Look at the Supreme Court and the Double Jeopardy Clause

I. Introduction

The fifth amendment of the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[1] In recent years, the United States Supreme Court has struggled when attempting to apply the general words of the double jeopardy clause to specific cases.[2] During the late 1970s and early 1980s, a period in which the Court began to decide double jeopardy cases more frequently than it had before,[3] the Court readily admitted that its decisions were not the product of a coherent doctrine.[4] Chief Justice Rehnquist once stated that the double jeopardy clause is "one of the least understood . . . provisions of the Bill of Rights. [The] Court has done little to alleviate the confusion . . . ."[5]

Nevertheless, since the early 1980s, the Court has seemed less tentative when addressing double jeopardy questions,[6] which suggests that the Court believes that its "closer look"[7] at the clause in the 1970s did "alleviate the confusion." Yet despite this apparent clarity in the Court's more recent decisions, the Court continues to struggle when attempting to apply the clause.

This Comment pursues the suggestion of one commentator that a "functional" analysis will enable the Court to apply the double jeopardy clause consistently.[8] A functional analysis "identifies the substantive values within . . . the Constitution, and applies these values in the context of our contemporary culture."[9] The Comment will

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1. U.S. Const. amend. V.

2. *See* McKay, *Double Jeopardy: Are the Pieces the Puzzle?* 23 Washburn L.J. 1, 6 (1983).

3. Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 83. Possible reasons for the increase in double jeopardy cases include the incorporation of the fifth amendment's double jeopardy protection into the fourteenth amendment in 1969, *see* Benton v. Maryland, 395 U.S. 784, 796 (1969), and the amendment of 18 U.S.C. § 3731 (1982) in 1971 to allow the government to appeal in criminal cases except "where the double jeopardy clause of the United States Constitution prohibits further prosecution." Omnibus Crime Control Act of 1970, tit. III, § 14(a)(1), Pub. L. No. 91-644, 84 Stat. 1891. *See also* United States v. Wilson, 420 U.S. 332, 339 (1975) ("Now that Congress has removed the statutory limitations and the Double Jeopardy Clause has been held to apply to the states . . . it is necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases.").

4. *See* Albernaz v. United States, 450 U.S. 333, 343 (1981) ("the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"); United States v. DiFrancesco, 449 U.S. 117, 133–34 (1980) (double jeopardy clause's "application has not proved to be facile or routine"); Burks v. United States, 437 U.S. 1, 9 (1978) (Court's holdings "can hardly be characterized as models of consistency and clarity").

5. Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

6. *Compare* Albernaz v. United States, 450 U.S. 330 (1981), and United States v. DiFrancesco, 449 U.S. 117 (1980) *with* Missouri v. Hunter, 459 U.S. 359 (1983), and Bullington v. Missouri, 451 U.S. 430 (1981).

7. United States v. Wilson, 420 U.S. 332, 339 (1975).

8. McKay, *supra* note 2, at 1.

9. *Id.* at 1 n.4.

first trace the double jeopardy clause's historical background, since the Court primarily relies on history when attempting to apply the clause. It will then enumerate the clause's possible functions. Lastly, it will examine three specific double jeopardy questions and discuss recent Supreme Court decisions relating to those three questions. This discussion will show how the Court's current approach creates haphazard results and will suggest how the Court might have decided recent cases if the Court had been more conversant with the clause's functions.

II. A Historical Look At The Double Jeopardy Clause

The Court's recent double jeopardy decisions have relied primarily on the numerous cases that the Court decided during the late 1970s and early 1980s, which in turn relied primarily on the Court's interpretation of the clause's history.[10] Therefore, an understanding of the Court's more recent decisions requires a brief look at the clause's history and an explanation of why the Court should not use a historical approach in double jeopardy cases.

The origins of the double jeopardy concept are obscure because the concept is nearly universal. Some kind of double jeopardy maxim has existed "in almost all systems of jurisprudence throughout history."[11] The English common law was no exception, since it recognized the idea that "a man's life shall not be put twice in jeopardy for the same offense."[12]

The word "jeopardy" first appeared in an English law report in 1421.[13] Fifteenth century cases using the term said that a plea of not guilty put a defendant's life "in jeopardy."[14] However, the term "jeopardy" did not have the legal significance then that it has today.[15] At that time, the law usually associated "jeopardy" with actions for malicious appeal or for conspiracy to procure an indictment for felony. A plaintiff bringing either type of action against his alleged persecutor had to show that the defendant's actions had caused the plaintiff to put his life "in jeopardy" (by pleading not guilty).[16] The maxim that stated a prohibition against *twice* putting a person in jeopardy did not emerge until the mid-sixteenth century.[17]

Despite the absence of the term "double jeopardy," the common law had recognized the general concept by the thirteenth century, although England's archaic system of dual prosecutions lessened the usefulness of double jeopardy protection.[18]

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10. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 133 (1980); Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Wilson, 420 U.S. 332, 339–42 (1975).

11. Note, Heath v. Alabama—*Contravention of Double Jeopardy and Full Faith and Credit Principles*, 17 Loy. U. Chi. L.J. 721, 723 (1986). *See also* Benton v. Maryland, 395 U.S. 784, 795 (1969).

12. Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. Pa. L. Rev. 602, 616–17 (1934).

13. *Id.* at 613.

14. *Id.* at 611.

15. *Id.* at 613, 615.

16. *Id.* at 613–16.

17. *Id.* at 616–17. *But see id.* at 615 (citing Hil. 21 Hen. VI, f. 28, pl.12 (1443)) (judge's reference, over his colleague's objection, to a prohibition against being placed "twice in jeopardy").

18. Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. Legal Hist. 3, 8–10 (1984).

The transition in the early Middle Ages from a law of private feud to state controlled prosecutions had resulted in a system that allowed prosecution by either an appeal of felony by a private party or indictment by the Crown.[19] The system recognized a concept of double jeopardy because, if an appeal of felony or indictment resulted in an acquittal of the accused on the merits, the appellant or the state could not bring another action.[20] However, double jeopardy protection was limited. For example, in an appeal of felony case, an acquittal only barred a second appeal by that particular appellant. In the earliest form of the appeal of felony, anyone who had raised the original "hue and cry" against the accused could bring an appeal.[21] Also, an acquittal based on a technical defect in the pleading in an appeal of felony case did not bar subsequent indictment.[22] In addition, a statute passed in 1487[23] provided that an acquittal after indictment for homocide did not bar a subsequent prosecution by appeal of felony. Parliament did not repeal this statute until 1819 (although the appeal of felony had by then become obsolete).[24]

The common law's double jeopardy protection eventually took the form of four "pleas in bar": the pleas of *autrefois acquit*, *autrefois convict*, *autrefois attaint*, and "former pardon."[25] A person could use one of these pleas to bar prosecution on the grounds that the state had already acquitted, convicted, attainted, or pardoned him for the offense of which he was accused.[26] Sir William Blackstone, when discussing the plea of *autrefois acquit* in his famous eighteenth century commentaries on the laws of England, repeated the "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence."[27]

Only two of the American state constitutions adopted after the Revolutionary War contained a double jeopardy protection,[28] probably because the states tailored the rights enumerated in their constitutions to specific abuses committed by the colonial English government.[29] Nevertheless, a double jeopardy proscription was part of the original group of "propositions" or proposed amendments to the United States Constitution that James Madison introduced in the United States House of Representatives in 1789 and that eventually became the Bill of Rights. Proposition 4, clause 5, stated that "no person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence."[30]

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19. *Id.* at 8.

20. *Id.* at 9; Kirk, *supra* note 12, at 607.

21. Hunter, *supra* note 18, at 9.

22. *Id.*

23. 3 Hen. VII, ch. 1.

24. Kirk, *supra* note 12, at 608–09.

25. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 754 (1983); The word "autrefois" meant "formerly." BLACK'S LAW DICTIONARY 123 (5th ed. 1979). Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 329 (1986).

26. United States v. Wilson, 420 U.S. 332, 341–42 (1975).

27. 4 W. BLACKSTONE, COMMENTARIES 335.

28. J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 23 (1969). The two states were New Hampshire and Pennsylvania.

29. Cantrell, *supra* note 25, at 766–67.

30. SIGLER, *supra* note 28, at 31.

The legislative history of the double jeopardy clause is slim. Congress apparently did intend the clause to conform to "universal practice" in Great Britain and the United States.[31] Congress also changed the clause's original wording. Representative Egbert Benson of New York objected to the words "or trial" on the grounds that they might be construed to bar a convicted defendant's appeal, something not required by the principle "that no man's life should more than once be put in jeopardy for the same offence."[32] Benson moved that the words "or trial" be stricken and Congress adopted the motion, eventually changing the words "punishment or trial" to the more Blackstone-like "jeopardy of life and limb."[33]

Since the archaic wording of the double jeopardy clause "is not a clear declaration of policy,"[34] a court attempting to apply the clause must turn to non-textual sources.[35] The Supreme Court has chosen to turn to history.[36] However, the Court's historical approach does not suffice to determine double jeopardy clause questions for three reasons. First, historical ambiguity lessens the usefulness of a strictly historical approach.[37] In some cases in which the Court used historical arguments, it could easily have used other historical arguments to support different resolutions of the same case. Secondly, even if one could recreate the intended role of double jeopardy protection at the time of the adoption of the Bill of Rights through a narrow "interpretivist" approach,[38] that approach could not adequately define the clause's function in present-day society because such an approach might fail to take account of "changes that have occurred in our criminal justice system over the past two hundred years."[39] Thirdly, a historical approach is inconsistent with the approach the Court takes to other fundamental constitutional rights. The Court, when it recognized that the double jeopardy clause applies to the states through the due process clause of the fourteenth amendment, stated that "the double jeopardy prohibition of the [f]ifth [a]mendment represents a fundamental ideal in our constitutional heritage. . . ."[40] The Court has generally rejected a strict historical approach to issues involving other fundamental constitutional rights and has instead taken a functional approach.[41] The Court should do the same when dealing with the fundamental protection against double jeopardy.

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31. *Id.* at 32.

32. Green v. United States, 355 U.S. 184, 202 (1957) (Frankfurter, J., dissenting).

33. SIGLER, *supra* note 28, at 30–31.

34. *Id.* at 32.

35. *Id.* at 14.

36. McKay, *supra* note 2, at 11. *See* Gore v. United States, 357 U.S. 386, 392, *reh'g denied*, 358 U.S. 858 (1958) (double jeopardy "is rooted in history and is not an evolving concept like due process"). *See supra* text accompanying note 10.

37. *See infra* text accompanying notes 87–90, 158–61.

38. *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) ("[i]nterpretivism calls for an historical inquiry into the intent of the framers"); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 284–301 (1981).

39. McKay, *supra* note 2, at 16. *See also* Findlater, *Retrial after a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 737 (1981) ("[d]ouble jeopardy is a constitutional doctrine, and, as such, its hoary common law antecedents should not from their graves control and distort its policies.").

40. Benton v. Maryland, 395 U.S. 784, 794 (1969).

41. *See* McKay, *supra* note 2, at 16 n.112, 17 n.114 (citing functional approach to freedom of speech, right to counsel, an accused's right to trial by jury, and cruel and unusual punishment). *See also* Taylor v. Illinois, 108 S. Ct. 646, 651–52, *reh'g denied*, 108 S. Ct. 1283 (1988) (compulsory process clause of the sixth amendment).

Thus, a historical approach is inadequate for three reasons: (1) historical ambiguity; (2) changes in the criminal justice system since the time of the adoption of the Bill of Rights; and (3) consistency with the Court's method of applying other constitutional provisions.

III. A Functional Look at the Double Jeopardy Clause

Green v. United States[42] is the starting point for an examination of the double jeopardy clause's function, because in *Green* the Court discussed the clause's "underlying idea,"[43] which is that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.[44]

According to this statement, the clause protects two values,[45] both of which are threatened by "repeated attempts to convict an individual for an alleged offense" and both of which arise from the fact that the state has more "resources and power" than an individual defendant.

The first value is the defendant's "finality" interest.[46] Repeated attempts to convict an individual compel a defendant to live "in a continuing state of anxiety and insecurity."[47] Once accused of a crime, a defendant "must suffer the anxiety of not knowing whether he will be found criminally liable and whether he will have to suffer a prison term."[48] Without double jeopardy protection, a defendant's ability to conduct his life would be hampered by the fear of renewed exposure to the "embarrassment, expense and ordeal" of trial.[49] The clause thus protects "the accused's interest in repose"[50] or his interest in "being able, once and for all, to conclude his confrontation with society."[51]

The second value is a need to prevent the state from "enhancing the possibility

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42. 355 U.S. 184 (1957).

43. *Id.* at 187.

44. *Id.* at 187–88. The Court has generally adhered to *Green*'s definition of the clause's purpose. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 445 (1981); United States v. DiFrancesco, 449 U.S. 117, 127–28 (1980); United States v. Scott, 437 U.S. 82, 87, 95, *reh'g denied*, 439 U.S. 883 (1978); United States v. Wilson, 420 U.S. 332, 343 (1975). However, the Court is not necessarily taking a functional approach merely because it is citing *Green*. *See, e.g.*, Morris v. Matthews, 475 U.S. 237, 247, *reh'g denied*, 475 U.S. 1132 (1986), in which the Court invoked *Green* as a reason for not granting a new trial when the defendant *wanted* a new trial. The Court's statement in *Green*, though, was obviously concerned with protecting an *unwilling* defendant from the hazards of a new trial. Note, Morris v. Matthews: *A Constitutional Salve for Double Jeopardy Violations*, 38 Mercer L. Rev. 715, 730 (1987).

45. Findlater, *supra* note 39, at 713.

46. Westen & Drubel, *supra* note 3, at 84. *See also* Crist v. Bretz, 437 U.S. 28, 33 (1978).

47. Green v. United States, 355 U.S. 184, 187 (1957).

48. Comment, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach*, 69 Calif. L. Rev. 863, 865 (1981).

49. Green v. United States, 355 U.S. 184, 187 (1957).

50. Benton v. Maryland, 395 U.S. 784, 810 (1969) (Harlan, J., dissenting).

51. United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion).

that even though innocent, [a defendant] may be found guilty."[52] A second trial might create "an unacceptably high risk that the Government, with its superior resources, would wear down a defendant."[53] The "wearing down" interest reflects a presumption that the imbalance in resources between the defense and the prosecution is so great that a defendant will not receive a fair trial if subject to repeated attempts at prosecution.[54]

In short, the Court recognized in *Green* that the double jeopardy clause protects a person from "the harassment traditionally associated with multiple prosecutions."[55] The clause represents a judgment "deeply ingrained in at least the Anglo-American system of jurisprudence"[56] that, because of the state's "resources and power,"[57] each intrusion into a person's life in the form of a criminal accusation has the tendency to harass that person. Therefore, the clause limits the number of prosecutions that the state can bring, insuring a minimum interference with individual liberty.[58]

Others have suggested additional functions of the double jeopardy clause. In a recent explanation of the clause's function that the Court found "provocative and thoughtful,"[59] Professor Peter Westen argued that the double jeopardy clause protects three values: "(1) the integrity of a jury verdict of not guilty, (2) the lawful administration of prescribed sentences, and (3) the interest in repose."[60] The first interest is "jury nullification." Pointing to the absence of directed verdicts and similar civil jury control devices in criminal trials, Westen argued that juries have an absolute prerogative to acquit against the weight of evidence.[61] The jury has "the power to veto legislation in particular cases" in which it feels enforcement of the law would be too harsh on the accused.[62] Westen's second interest, which is recognized by the Court as well,[63] is that of preventing judges from sentencing defendants to punishments greater than the legislature has clearly authorized.[64] The source of this interest is probably a general due process requirement that an accused must have

52. Green v. United States, 355 U.S. 184, 188 (1957).

53. United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

54. Hodge, *Deadlocked-Jury Mistrials, Lesser Included Offenses, and Double Jeopardy: A Proposal to Strengthen the Manifest Necessity Requirement*, 9 CRIM. JUST. J. 9, 31–33 (1986); Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 505 (1977).

55. United States v. Wilson, 420 U.S. 332, 352 (1975).

56. Green v. United States, 355 U.S. 184, 187 (1957).

57. *Id.*

58. *See* Thomas, *supra* note 25, at 325 ("[V]irtually everyone agrees that [the double jeopardy] prohibition is an essential part of an individual's protection against governmental tyranny").

59. United States v. DiFrancesco, 449 U.S. 117, 129 n.10 (1980).

60. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH L. REV. 1001, 1002 (1980). *See also* Westen & Drubel, *supra* note 3, at 84.

61. Westen, *supra* note 60, at 1012–18.

62. *Id.* at 1012.

63. *See infra* text accompanying note 85. *See also* Ohio v. Johnson, 467 U.S. 493, 499, *reh'g denied*, 468 U.S. 1224 (1984).

64. Westen, *supra* note 60, at 1026–27.

notice that his conduct is criminal.[65] Westen's third interest is identical to the Supreme Court's finality interest.[66]

Judge Monroe McKay suggested another possible function of the double jeopardy clause. McKay stated that under a common law system "that prescribed [sic] few and distinct crimes . . . [and] that applied jury rules virtually eliminating mistrials, the threat of multiple prosecution and punishment arose most visibly in the repetition of a prosecution following acquittal or conviction."[67] However, given the present American system of overlapping crimes, less formal indictments, and mistrials,[68] McKay felt that the modern double jeopardy clause should serve as a limit on excessive prosecutorial discretion in charging persons with crimes, because prosecutorial discretion can become a means of harassment or oppression.[69]

In sum, the Supreme Court and others have identified five possible functions of the double jeopardy clause: (1) protecting the defendant's finality interest; (2) preventing the state from "wearing down" an innocent defendant; (3) protecting the integrity of jury acquittals; (4) preventing judges from imposing punishments not authorized by the legislature; and (5) preventing excessive prosecutorial discretion.

IV. A Functional Look at Double Jeopardy Issues

I will illustrate my contention that the Supreme Court's historical approach has, in recent years, created results at odds with the double jeopardy clause's proper function by comparing a functional analysis to the Supreme Court's treatment of specific double jeopardy issues. The comparison will focus on the following three issues: (1) the extent to which the double jeopardy clause protects a person from multiple punishment in one proceeding; (2) the effect of acquittals upon the state's ability to prosecute; and (3) the possibility that the clause protects a convicted defendant from resentencing for the same offense.

A. *The Extent of Multiple Punishment Protection*

The issue of multiple punishment arises after a defendant has been convicted of a crime. Multiple punishment occurs when a court gives the convicted defendant two sentences for the same conduct. The multiple punishment issue can occur after the defendant has been convicted in multiple trials, but the multiple punishment

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65. *See id.* at 1027–30. Westen links the "clearly authorized" requirement to void-for-vagueness and strict construction doctrines, both of which, along with the prohibition of ex post facto laws, are based at least in part on concepts of notice or "fair warning." *See* Weaver v. Graham, 450 U.S. 24, 28–29 (1981) (ex post facto laws); United States v. Bass, 404 U.S. 336, 348 (1971) (strict construction); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (void-for-vagueness). *See also* 1 W. LaFave & A. Scott, Substantive Criminal Law 2.2(d), 2.3(b), 2.4(a) (1986).

Westen, however, rejects the notice rationale in favor of a separation of powers explanation, *see* Westen, *supra* note 60, at 1028 n.83, which can garner some support from the Court's language in Whalen v. United States, 445 U.S. 684, 689 (1980) (the double jeopardy clause is "in this respect simply one aspect" of the doctrine of separation of powers). This rationale would only justify protection of this interest at the federal level because "the doctrine of separation of powers . . . is not mandatory on the States." *Id.* at 689 n.4. For a more thorough discussion of these issues, see Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

66. Westen, *supra* note 60, at 1033.

67. McKay, *supra* note 2, at 15.

68. *Id.*

69. *Id.* at 19.

issue is then subsumed in the multiple prosecution issue.[70] The multiple punishment issue, thus, is limited to whether a court may constitutionally impose legislatively authorized cumulative sentences in *one* proceeding. Although the Court had repeatedly said that the double jeopardy clause protects a defendant from multiple punishment,[71] the Court did not explicitly state whether a legislature may authorize cumulative sentences for the same conduct in one proceeding until recently.[72]

In *Brown v. Ohio*,[73] the Court seemed to recognize an absolute constitutional limitation on a state's ability to impose multiple punishment for the same conduct. The defendant in *Brown* had been sentenced under two different statutes,[74] but the Court, relying on *Blockburger v. United States*,[75] noted that two statutes do not have to proscribe exactly the same conduct for the conduct to be considered the "same offense" for double jeopardy purposes. *Blockburger* had held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not."[76] In *Blockburger* itself, the defendant had been convicted and sentenced for violating two statutes through one sale of narcotics. The Court found that, under its test, the two statutes did not proscribe the same offense. One statute required proof that the defendant had not sold

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70. *See infra* text accompanying note 131.

71. The Court included multiple punishment in what has proved to be its "favorite" definition of the clause's scope. Westen, *supra* note 60, at 1062. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (clause protects a person from (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishment for the same offense). *See also* Ohio v. Johnson, 467 U.S. 493, 498, *reh'g denied*, 468 U.S. 1224 (1984); United States v. DiFrancesco, 449 U.S. 117, 129 (1980); Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Wilson, 420 U.S. 332, 343 (1975). The Court apparently lifted the definition from Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 265–66 (1965). *See* Westen, *supra* note 60, at 1062 n.211.

Note that the double jeopardy clause only prohibits reprosecution for the "same offense," *i.e.*, the same conduct. *See* Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 55 (1985). The usually textually ambiguous double jeopardy clause compels the "same offense" requirement. *See supra* text accompanying note 1.

The same offense requirement masks two separate issues: (1) the definition of the proscribed unit of conduct in a statute and (2) the determination of whether two statutes proscribe the same conduct. Thomas, *supra* this note, at 5. *See* Sanabria v. United States, 437 U.S. 54, 69–70 & 70 n.24 (1978); Gore v. United States, 357 U.S. 386, 393–94, *reh'g denied*, 358 U.S. 858 (1958) (Warren, C.J., dissenting). This Comment only discusses the second issue. For cases illustrating the first issue, *see* Ciucci v. Illinois, 356 U.S. 571, *reh'g denied*, 357 U.S. 924 (1958) (in which petitioner conceded that the state could charge him in four separate indictments for the murder of his wife and three children); Bell v. United States, 349 U.S. 81 (1955) (in which the Court held that the transportation of two women across a state line at one time for immoral purposes could support conviction on only one count of violating the Mann Act).

72. Thomas, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter, 62 WASH. U.L.Q. 79, 90 (1984).

73. 432 U.S. 161 (1977).

74. *Id.* at 162–63.

75. 284 U.S. 299 (1932); Brown v. Ohio, 432 U.S. 161, 164–66 (1977).

76. Blockburger v. United States, 284 U.S. 299, 304 (1932). *See* Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (proof of felony murder in the course of armed robbery will necessarily prove the underlying felony). *See also* Illinois v. Vitale, 447 U.S. 410 (1980). In *Vitale*, the state initially found the respondent guilty of failure to reduce speed when driving a car. *Id.* at 412. The state later charged the respondent with involuntary manslaughter, which required proof that the defendant had operated the car recklessly. *Id.* at 413 n.4, 416–17. Before trial the respondent moved to dismiss. The Court, however, said dismissal was improper before the trial because, if the state chose to rely on reckless acts other than a failure to slow, the offenses would not be the same; *id.* at 419, just as in *Harris v. Oklahoma*, the felony murder charge would not have been the same offense as the armed robbery charge if the state based the felony murder charge on a different felony, for example assault. If the state chose to prove reckless operation through failure to slow in *Vitale*, the defenses would have been the same. *See* Illinois v. Vitale, 447 U.S. 410, 420–21 (1980); Harris v. Oklahoma, 433 U.S. 682, 682 (1977).

the narcotics in their "original shipped package;" the other statute required proof that the defendant had not sold the narcotics pursuant to a written order.[77]

In *Brown*, the Court found that "joyriding" constituted an element or "lesser-included offense" of auto theft in Ohio and therefore constituted the same offense under the *Blockburger* test.[78] The *Brown* Court then described the *Blockburger* test as "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment."[79] Accordingly, since the defendant had already been convicted and sentenced under Ohio's joyriding statute, the Court reversed the defendant's conviction and sentence for auto theft as unconstitutional multiple punishment.[80] The Court's language would seem to preclude cumulative punishment for the same offense in one proceeding, even if the legislature specifically authorized cumulative punishment. However, the Court's statement may have been dicta because *Brown* involved multiple prosecutions for the same offense, not multiple punishment for the same offense in one proceeding.[81]

In *Missouri v. Hunter*,[82] the Court explicitly rejected the idea that the double jeopardy clause will always preclude a legislature from imposing multiple punishments for the same offense in one proceeding. A Missouri court had convicted and sentenced the defendant for the offenses of "robbery in the first degree" and "armed criminal action," which were defined by and punishable under separate statutes.[83] Conceding that the statutes proscribed the same offense, the Court nevertheless upheld the sentences because "[l]egislatures, not courts, prescribe the scope of punishments"[84] and because "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[85] Therefore, where, as here, a legislature specifically authorizes "cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose punishment under such statutes in a single trial."[86]

Historical arguments do not conclusively support the result in *Hunter*. An analysis of the role of double jeopardy protection at the time of the adoption of the Bill of Rights in 1791 does not resolve the issue of whether a legislature can authorize the imposition of multiple punishment in one proceeding because the historical evidence lends itself to differing interpretations. The original phrasing of Madison's

77. Blockburger v. United States, 284 U.S. 299, 300 nn.1–2, 304 (1932).

78. Brown v. Ohio, 432 U.S. 161, 168 (1977). Under Ohio law, auto theft "consist[ed] of joyriding with the intent permanently to deprive the owner of possesesion." *Id.* at 167. The Court did not have to look at the proof at trial as in *Harris* and *Vitale*, *see supra* note 76, because Ohio law always required proof of one particular lesser offense.

79. Brown v. Ohio, 432 U.S. 161, 166 (1977).

80. *Id.* at 169–70.

81. The defendant had been prosecuted in Wickliffe, Ohio for joyriding and prosecuted in the Cuyahoga County Court of Common Pleas for auto theft. *Id.* at 162–63.

82. 459 U.S. 359 (1983).

83. *Id.* at 361–62.

84. *Id.* at 368.

85. *Id.* at 366.

86. *Id.* at 368–69.

clause can support an argument that the clause protects a defendant from multiple punishment imposed in one proceeding.[87] Conversely, the fact that the pleas of *autrefois acquit* and *autrefois convict* were designed to protect a defendant from multiple trials supports the opposite conclusion. Any collateral protection from multiple punishment may have merely been a result of the nature of common law criminal procedure. Common law criminal indictments generally accused a defendant of only one felony. Generally, a felony described one course of conduct and could result in only one sentence.[88] Under this procedure, multiple punishment for the same conduct could not normally exist without multiple trials.[89] Thus, the common law pleas may not have been concerned with multiple punishment imposed in one proceeding.[90] In sum, historical arguments could support differing conclusions.

Although history does not fully support the Court's interpretation of the double jeopardy clause in *Hunter*, one might still be able to defend the *Hunter* decision on the grounds that the legislative authorization of multiple punishment in that case did not interfere with four of the clause's five possible functions.[91] The case did not implicate the interest in the lawful administration of prescribed sentences[92] because the Missouri legislature clearly intended to allow the imposition of cumulative sentences.[93] The finality interest, the interest in preventing the government from "wearing down" the defendant, and the interest in jury acquittals were also irrelevant because the sentencing occurred as part of one proceeding.

The remaining of the five interests is in preventing harassment through the prosecutor's option to bring multiple charges. Before discussing the impact of the fifth interest, it should be noted that one commentator has suggested a sixth interest in this area, arguing that "the legislature's right to define punishment should be restricted under the double jeopardy clause by the doctrine of proportionality."[94] However, constitutional provisions other than the double jeopardy clause may protect these interests. The *Hunter* Court was careful to note that it only addressed the issue of cumulative punishment as it related to the double jeopardy clause.[95]

Classifying an interest under a particular constitutional provision seems unimportant if everyone agrees that some part of the constitution protects the interest. The

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87. Cantrell, *supra* note 25, at 770; Thomas, *supra* note 71, at 3 n.3; Comment, *Twice in Jeopardy*, *supra* note 71, at 265 n.12, 266 n.13.

88. *See* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970). Professor Thomas notes that the only common law theft crime was larceny and that, in contrast some states now have as many as sixty theft crimes. Thomas, *supra* note 25, at 397.

89. McKay, *supra* note 2, at 13–14. *See also* Comment, *Twice in Jeopardy*, *supra* note 71, at 266 n.13. *Cf.* Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 919 n.17 (1958) which says that "[m]ultiple count indictments were not unusual at common law" and that "consecutive sentencing was possible . . . . Nevertheless, pleas of *autrefois acquit* or *autrefois convict* apparently were considered improper unless a former trial and verdict were shown."

90. SIGLER, *supra* note 28, at 15; Note, *Consecutive Sentences*, *supra* note 89, at 918–20.

91. *See supra* text accompanying notes 42–69.

92. *See supra* text accompanying notes 63–65.

93. The armed criminal action statute said that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for a crime committed, by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." MO. REV. STAT. 571.015(1) (1978).

94. Cantrell, *supra* note 25, at 772.

95. Missouri v. Hunter, 459 U.S. 359, 368 n.5 (1983).

Court's refusal to designate the protection of a particular interest as a function of the double jeopardy clause would be a problem only if protection of that interest were *solely* a function of the double jeopardy clause. Protection of the hypothetical sixth double jeopardy interest does not present such a problem because the proportionality of sentences is guaranteed by the eighth amendment's "cruel and unusual punishment" clause.[96] Under the eighth amendment, a person is protected from "excessive punishments."[97]

The fifth interest, the possibility that multiple charging under overlapping statutes will become a tool of harassment for prosecutors, presents a tougher issue than proportionality for two reasons. First, the Court has not explicitly recognized that protection from multiple charging is protected by constitutional provisions other than the double jeopardy clause. Second, the Court has also explicitly stated in *Ball v. United States*[98] that "even where the Clause bars cumulative punishment for a group of offenses, 'the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution.' "[99] The Court in *Ball* also noted that it had "long acknowledged the Government's broad discretion to conduct criminal prosecutions."[100]

Nevertheless, the state's ability to bring multiple charges may enhance the possibility that an innocent defendant may be found guilty because of a jury compromise. "The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes."[101] Splitting the punishment for an offense among several statutes therefore "serves only to strengthen the prosecution's hand."[102]

However, the problem of jury compromise would always arise in a case that involves both a lesser-included and greater offense. For example, in a case like *Brown v. Ohio*,[103] in which a state charges a defendant with car theft, the judge would presumably instruct the jury that they could alternatively find the defendant guilty of the lesser-included offense of joyriding.[104] Thus, the possibility of a compromise

96. Solem v. Helm, 463 U.S. 277, 284–86 (1983); Rummel v. Estelle, 445 U.S. 263, 271–72 (1980). *See* Note, *Fifth Amendment—Double Jeopardy: Legislative Intent Controls in Crimes and Punishments*, 74 J. CRIM. L. & CRIMINOLOGY 1300, 1312–13 (1983).

97. Solem v. Helm, 463 U.S. 277, 286 (1983). To determine whether a penalty is disproportionate, a court must look at objective criteria, such as "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions." *Id.* at 292. Under this test, "outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* at 289–90 (quoting Rummel v. Estelle, 445 U.S. 263, 271–72 (1980)). The four dissenters in *Solem* wished to limit proportionality review to "sentences of death or bizarre physically cruel punishments." *Id.* at 307 (Burger, C.J., dissenting).

98. 470 U.S. 856 (1985).

99. *Id.* at 860 n.7 (quoting Ohio v. Johnson, 467 U.S. 493, 500 (1984)).

100. Ball v. United States, 470 U.S. 856, 859 (1985).

101. Missouri v. Hunter, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting), *quoted in* Ball v. United States, 470 U.S. 856, 867–68 (1985) (Stevens, J., concurring).

102. Missouri v. Hunter, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting).

103. *See supra* text accompanying note 78.

104. *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 23.6(b), at 40 n.22 (1984) (discussing whether a judge commits reversible error by *not* instructing the jury on a lesser-included offense); FED. R. CRIM. P. 31(c) ("The defendant may be found guilty of an offense necessarily included in the offense charged . . . .").

verdict would exist regardless of whether the prosecution had actually charged the two offenses.

Under the facts of *Hunter*, however, the use of multiple charging did enhance the possibility of an irrational jury compromise because the two statutes defined identical offenses, not a lesser-included and greater offense. In *Hunter*, "the State was not required to prove a single fact in addition" to first-degree robbery in order to convict the defendant of armed criminal action.[105] The Court has held that, when one offense "completely encompasse[s]"[106] the other, the jury will not receive a lesser-included offense instruction: "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense."[107] Thus, the state's action created a disadvantage for the defendant that would not otherwise have existed. The due process or double jeopardy clause should protect a defendant from this increase in the likelihood of being found guilty, since the charging of identical crimes serves "no valid state interest."[108]

Nevertheless, except in the rare case of crimes with identical elements, the *Hunter* Court's general recognition that the double jeopardy clause does not limit the legislative branch's ability to define punishments is consistent with the double jeopardy clause's function. The Court's deference to the legislative branch was not total. For example, the Court left the *Blockburger* test intact both as a means of defining "same offense" and as a tool of statutory construction when a legislature's intent is unclear.[109]

However, in *Garrett v. United States*,[110] the Court's[111] deference to Congress may have signaled an abandonment of both uses of the *Blockburger* test. In *Garrett*, the defendant had been convicted under the "Kingpin" statute,[112] aimed at the "top brass" in the drug trade.[113] A conviction for engaging in a "continuing criminal enterprise" under the statute required proof of violation of another drug offense under 21 U.S.C. §§ 801-996.[114] The trial court had also convicted the defendant of several of these drug offenses, which are "predicate" to a violation of the continuing criminal enterprise statute.[115]

The Court found that, under the *Blockburger* test, the predicate offenses were lesser-included offenses of the continuing criminal enterprise statute.[116] The Court

105. Missouri v. Hunter, 459 U.S. 359, 369–70 (1983) (Marshall, J., dissenting).

106. Sansone v. United States, 380 U.S. 343, 350 (1965).

107. *Id.* at 350. *See also* Missouri v. Hunter, 459 U.S. 359, 372 n.4 (1983) (Marshall, J., dissenting).

108. Missouri v. Hunter, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting).

109. *See* Ball v. United States, 470 U.S. 856, 861 (1985); United States v. Woodward, 469 U.S. 105, 108 (1985).

110. 471 U.S. 773, *reh'g denied*, 473 U.S. 927 (1985).

111. Justice Rehnquist's opinion was a majority opinion because four justices joined it, although one of those justices (Justice O'Connor) also wrote a separate opinion. *See* United States v. Guthrie, 789 F.2d 356, 359 n.3, *reh'g denied*, 793 F.2d 1287 (5th Cir. 1986).

112. 21 U.S.C. § 848 (1982). *See* United States v. Fernandez, 822 F.2d 382, 385 (3d Cir.), *cert. denied*, 108 S. Ct. 450 (1987).

113. Garrett v. United States, 471 U.S. 773, 781, *reh'g denied*, 473 U.S. 927 (1985).

114. *Id.*

115. *Id.* at 775–76.

116. *Id.* at 779.

also found that "[n]owhere in the legislative history is it stated that a big-time drug operator could be prosecuted and convicted for the separate predicate offenses as well as the CCE offense."[117] Therefore, the Court should have found that Congress did not authorize multiple punishments because of the result of the *Blockburger* test and the lack of explicit legislative intent. Nevertheless, the Court upheld the defendant's convictions because, after examining legislative history, the Court found that Congress intended to create "separate offenses." The Court seemed to be following the *Ball* Court's distinction between multiple charging and multiple punishment, and using the words "separate offenses" as a shorthand for multiple charging, which the *Blockburger* test does not affect.[118]

However, the Court also gave the words "separate offenses" their literal meaning. The Court said that its examination of congressional intent revealed the existence of two separate offenses. When two offenses are truly separate, the Court does not need an explicit statement of intent to punish cumulatively.[119] "[T]he presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish ambiguity or rebut this presumption . . . ."[120] The words "two distinct offenses" had previously meant offenses that did not overlap under the *Blockburger* test. In *Garrett*, however, the Court seemed to be saying that mere congressional intent to create separate offenses would, in fact, create separate offenses. Thus, the Court, for the first time, found it unnecessary to determine congressional intent to impose cumulative punishment for offenses deemed the same under the *Blockburger* test. The Court said a clear statement of intent to impose cumulative punishment was unnecessary "where Congress was not silent as to its intent to create separate offenses, notwithstanding *Blockburger*."[121]

The Court cited *Albernaz v. United States*[122] as support for its rejection of a clear statement requirement.[123] However, in *Albernaz*, the Court had found the two offenses in that case to be *separate* under the *Blockburger* test.[124] The *Albernaz* Court then rejected any presumption of intent to separately punish offenses that are separate under the test.[125] The *Garrett* Court used language from *Albernaz* to justify deference to Congress even though the offenses in *Garrett* were the *same* under the test.

The Court should return to its use of *Blockburger* as a means of defining separate offenses. The "dispositive question" should be whether Congress clearly intended to authorize cumulative punishment,[126] not whether it intended to create separate offenses. Otherwise, Congress could not only authorize multiple punishment for the

117. *Id.* at 784.
118. *Id.* at 782–84. *See supra* text accompanying notes 98–99.
119. Albernaz v. United States, 450 U.S. 333, 343–44 (1980).
120. Garrett v. United States, 471 U.S. 773, 793, *reh'g denied*, 473 U.S. 927 (1985) (citing Albernaz v. United States, 450 U.S. 333, 341–42 (1980)).
121. *Id.* at 794.
122. 450 U.S. 333 (1981).
123. Garrett v. United States, 471 U.S. 773, 794, *reh'g denied*, 473 U.S. 927 (1985).
124. Albernaz v. United States, 450 U.S. 333, 339 (1981).
125. *Id.* at 343–44.
126. *Id.* at 344.

same offense under two statutes but could authorize successive prosecutions as well, simply by emphatically stating that the statutes actually proscribe separate offenses.[127] If *Garrett* were read literally, the double jeopardy clause would neither bar legislative interferences with a defendant's finality nor "wearing down" interest through multiple prosecutions for the same offense, since Congress could use its ability to define "same offense" to immunize prosecutions from double jeopardy challenges.[128]

The Court should also retain the *Blockburger* test as a useful tool of statutory construction when legislative intent is unclear. It is logical to presume (although the presumption should be rebuttable by a clear statement) that a rational legislature "ordinarily does not intend to punish the same [conduct] under two different statutes."[129]

In conclusion, the Court's failure to recognize the double jeopardy clause's functions in *Garrett* may allow a legislature to negate important double jeopardy protections.[130]

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127. The *Blockburger* test is used in succesive prosecution cases as well as multiple punishment cases. Harris v. Oklahoma, 433 U.S. 682, 682 (1977) (per curiam); Brown v. Ohio, 432 U.S. 161, 166 (1977). If anything, the defendant in a successive prosecution case receives greater protection because more double jeopardy interests are implicated. Thomas, *supra* note 25, at 340–42. *See also* Brown v.Ohio, 432 U.S. at 166 n.6.

Confusingly, *Garrett* involved a successive prosecution issue separate from the cumulative punishment issue. The cumulative punishment issue arose from the prosecution of the defendant in Florida for the CCE offense and for three predicate offenses arising out of his involvement in marijuana smuggling in the Gulf of Mexico. Garrett v. United States, 471 U.S. 773, 800–01, *reh'g denied*, 473 U.S. 927 (1985) (Stevens, J., dissenting). In contrast, the successive prosecution issue arose from the fact that the prosecution also based the CCE charge on evidence relating to the defendant's prior conviction for marijuana smuggling in Neah Bay, Washington. *Id.* at 801–02, 805 (Stevens, J., dissenting). The Court found that the multiple prosecutions did not violate the double jeopardy clause because of the idea, recognized in *Brown*, that the state does not have to prosecute a defendant for both offenses if the second offense is not complete at the time of the first prosecution. *Id.* at 787–89. *See* Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977); Thomas, *supra* note 25, at 368.

128. Admittedly, the Court may not be able to use even the *Blockburger* test as a means to define offenses independent of legislative opinion. The *Blockburger* test focuses on the elements of an offense, yet the Court tends to defer to state legislatures' definitions of the elements of offenses. *See* Martin v. Ohio, 107 S. Ct. 1098, 1103, *reh'g denied*, 107 S. Ct. 913 (1987); Patterson v. New York, 432 U.S. 197, 201, 210 (1977). *But cf. Patterson*, 432 U.S. 197, 210 (1977) ("there are obviously constitutional limits beyond which the States may not go in this regard"); Mullaney v. Wilbur, 421 U.S. 684, 699 (1975):

> If *Winship* [*In re* Winship, 397 U.S. 358 (1970), which required proof "beyond a reasonable doubt of every fact necessary to constitute the crime with which [a defendant] is charged" for a conviction, (*id.* at 364.)] were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect . . . . It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

129. Ball v. United States, 470 U.S. 856, 861 (1985).

130. While I think my reading of the implications of *Garrett* is a fair one, *Garrett* also includes language upon which a future Court could focus in order to limit, rather than expand, its holding. The Court noted that even though Congress did not explicitly state an intention to punish cumulatively, "such a statement would have merely stated the obvious," given the harsh tone of the congressional debates. Garrett v. United States, 471 U.S. 773, 784–85, *reh'g denied*, 473 U.S. 927 (1985). The Court could, if so inclined, limit *Garrett* to a holding that a clear statement of intent to punish cumulatively is not necessary if Congress clearly expresses an intent to treat offenders harshly and dismiss the other language in the case as dicta. *Cf.* United States v. Grayson, 795 F.2d 278, 282 (3d. Cir. 1986), *cert. denied sub nom.* Robinson v. United States, 107 S. Ct. 927 (1987):

> [T]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history . . . . The language and legislative history of [the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (1982 & Supp. 1984)] indicates little doubt that Congress, in enacting RICO, sought to allow the separate prosecution and punishment of predicate offenses and a subsequent RICO offense.

But cf. United States v. Boldin, 772 F.2d 719, 729 (11th Cir. 1985) (Congressional *silence* justifies cumulative

B. *The Effect of Acquittals on the State's Ability to Prosecute*

A defendant clearly has a double jeopardy interest in not being retried for the same offense. Retrial implicates the first two functions of the double jeopardy clause.[131] However, the Court recognizes a countervailing state prosecutorial interest that must sometimes be "balanced"[132] against a defendant's interest in not being retried, which complicates a functional analysis of the double jeopardy protection from retrial after either (1) an acquittal or (2) other rulings that end a trial without a conviction.[133]

1. *The Defendant's Protection from Retrial After an Acquittal*

In one crucial area the Court has not balanced a countervailing state prosecutorial interest against a defendant's interest in not being retried. The Court has repeatedly said that the double jeopardy clause is an absolute bar to retrial after an acquittal (an acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged"[134]). "[A] verdict of acquittal is final, ending a defendant's jeopardy."[135] The clause is an absolute bar regardless of whether a jury or judge acquits. The clause is also an absolute bar to further proceedings even if an acquittal is based on an erroneous interpretation of law; an appellate court cannot reverse a judge's acquittal even if the judge based the acquittal "upon an egregiously erroneous foundation."[136]

In contrast, "retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused."[137] If the first trial does not end in a final verdict, a defendant's double jeopardy interest must sometimes yield to the state's interest in "one complete opportunity to convict those who violated its laws."[138]

At first glance, the Court's distinction does not seem compelled by a functional approach. Retrial clearly effects both the defendant's finality and "wearing down" interests even when the first trial does not resolve the issue of guilt or innocence. "A complete trial" will not necessarily "consume more of the defendant's time and

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punishment for RICO and predicate violation), *cert. denied sub. nom.*, Crump v. United States, 475 U.S. 1048; United States v. Schuster, 769 F.2d 337, 340 n.1 (6th Cir. 1985) ("the ultimate question of whether two offenses are the same is one of legislative intent"), *cert. denied*, 475 U.S. 1021 (1986). Note that *Schuster* involved successive prosecutions (although the court ultimately upheld the defendant's conviction at the second trial on grounds other than *Garrett*'s "legislative intent" language. *Id.* at 342–43).

131. *See supra* text accompanying notes 42–58.

132. United States v. Scott, 437 U.S. 82, 92 (1978).

133. Westen, *supra* note 60, at 1053.

134. United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), *cited in* United States v. Scott, 437 U.S. 82, 97 (1978). *See also* Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986) (state's "demurrer" device deemed an acquittal for purposes of the double jeopardy clause). A judge must grant judgment of acquittal if the evidence is insufficient to convict a defendant of all the elements of a crime beyond a reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307, 316–20 (1979), *reh'g denied*, 444 U.S. 890; FED. R. CRIM. P. 29.

135. Green v. United States, 355 U.S. 184, 188 (1957) (citing United States v. Ball, 163 U.S. 662, 671 (1896)). *See also* Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986); Arizona v. Washington, 434 U.S. 497, 503 (1978).

136. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam). *See also* Sanabria v. United States, 437 U.S. 54, 64 (1978).

137. Arizona v. Washington, 434 U.S. 497, 505 (1978).

138. *Id.* at 509.

money than will an aborted one."[139] For example, a mistrial due to a hung jury occurs at the same stage of a trial as one ending in a verdict.

Certainly, the state should not be allowed to appeal if the first trial ended in a final verdict and was free of legal errors. The state's prosecutorial interest is clearly satisfied even if a trier of fact finds the defendant not guilty, since the prosecutor has had "one full and fair opportunity to present his evidence to an impartial jury."[140] However, the state's interest in "one full and fair proceeding" may not be satisfied if, for example, an acquittal is the result of a trial court's erroneous exclusion of crucial evidence. The state's interest in a full and fair opportunity to convict might include a right to appeal an acquittal based upon a legal error, or at least would require a court to balance the conflicting interests of the state and defendant.[141]

Nevertheless, the values underlying the double jeopardy clause justify the distinction. First, the mere "availability of post-acquittal review" of an acquittal would "condemn all [acquitted] defendants to a continuing state of anxiety."[142] Consequently, the choice of a balancing test or an absolute prohibition results in either the state or the entire class of acquitted defendants (most of whom are undoubtedly not guilty beyond a reasonable doubt) "paying" for a trial judge's legal errors. The choice should be determined by society's "fundamental value determination . . . that it is far worse to convict an innocent man than to let a guilty man go free."[143] The risk of arbitrary decision-making should fall on the state.[144] Therefore, a court need not balance the interests of the state and defendant in retrial if the first trial ended in an acquittal: "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."[145]

Professor Westen's jury nullification interest, the third possible function of the double jeopardy clause, would support the absoluteness of jury acquittals, but not judge acquittals.[146] Jury nullification is a controversial subject[147] because a jury can nullify not only out of leniency but also out of less benign motives;[148] however, the

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139. Comment, *Twice in Jeopardy*, *supra* note 71, at 288 n.125.

140. Arizona v. Washington, 434 U.S. 497, 505 (1978). Principles of res judicata and collateral estoppel will apply to a second trial if the prosecution cannot obtain a reversal of the first trial's result. *See* Ashe v. Swenson, 397 U.S. 436, 443–44 (1970); United States v. Oppenheimer, 242 U.S. 85, 87–88 (1916).

141. *See* Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 548 (1979).

142. Findlater, *supra* note 39, at 728 n.123 ("Few, if any, trials are totally error-free. Most of the acquitted could, without the prosecutor subjecting himself to charges of bad faith, be put to a substantial prolongation of their ordeal . . . .").

143. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring), *cited in* Patterson v. New York, 432 U.S. 197, 208 (1977) (referring to the state's burden of proving every element of a crime beyond a reasonable doubt).

144. Gori v. United States, 367 U.S. 364, 373, *reh'g denied*, 368 U.S. 870 (1961) (Douglas, J., dissenting). The risk that the state bears may be relatively insignificant. If a trial court's erroneous exclusion of evidence would result in an acquittal, *see supra* text accompanying note 141, the state may be able to obtain immediate, pre-acquittal review of the ruling. *See* New York v. Quarles, 467 U.S. 649, 651 n.1 (1984); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1975).

145. Arizona v. Washington, 434 U.S. 497, 503 (1978).

146. *See supra* text accompanying notes 61–62.

147. *See* United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir 1972) (court opposed to informing jury that it can disregard the law); Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS 51, 85–110 (Autumn 1980); *Should Jurors be told they can Refuse to Enforce The Law?*, 72 A.B.A. J. 36 (Mar. 1,1986) [hereinafter *Jurors*].

148. *See Jurors*, *supra* note 147, at 38 (statement by Professor Burke Marshall that jury nullification's "main use

validity of the absolute double jeopardy bar to reprosecution after jury acquittals does not depend upon a resolution of the controversy. Even without jury nullification, the fact that the state's prosecutorial interest is satisfied by a determination of guilt or innocence prevents a court from reviewing *any* acquittal. The jury has a *de facto* power to nullify because the double jeopardy clause prevents anyone from stopping it.[149]

In sum, the Court's approach seems consistent with the values underlying the clause, but the correctness of the Court's interpretation is probably fortuitous.[150]

2. *The Defendant's Protection from Retrial After Dismissal or Declaration of a Mistrial*

A trial may end before acquittal in two ways: (1) through declaration of a mistrial or (2) through dismissal.[151] According to the Court, the double jeopardy consequences of a declaration of mistrial depend on whether the declaration occurred (1) at the request or with the consent of the defendant; (2) at the request of the prosecutor; or (3) upon a *sua sponte* motion by the judge. In the first situation, the clause does not bar reprosecution, with one narrow exception.[152] In contrast, the clause bars a mistrial declared at the request of a prosecutor unless the prosecutor shows that the judge ended the first trial only out of "manifest necessity."[153] The "prototypical" example of manifest necessity to end a trial is a hung jury.[154] A *sua sponte* declaration of a mistrial is apparently also barred unless "manifest necessity" exists for discharging the jury.[155] The Court seems to take a parallel course in the context of dismissals. In *United States v. Scott*,[156] the Court found that a dismissal at the defendant's request was the functional equivalent of a mistrial declared at the defendant's request.[157]

The Court's approach in this area is not compelled by history. The Court might

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in this century probably has been to protect whites from the consequences of their unlawful, often violent, racial oppression of blacks").

149. *See id.* at 36 (statement by Professor Marshall that "what makes [the nullification] power effective" is the double jeopardy clause).

The Court's occasional references to jury nullification are consistent with this viewpoint. The Court has stated that "[t]he absence of these remedial procedures [directed verdict, etc.] in criminal cases permits juries to acquit out of compassion . . . or because of 'their assumption of a power which they had *no right* to exercise, but to which they are disposed through lenity.'" Standefer v. United States, 447 U.S. 10, 22 (1980) (*quoting* Dunn v. United States, 284 U.S. 390, 393 (1932)) (emphasis added). The Court's cryptic comment suggests that jury nullification is merely "the logical corollary of the rule that there can be no appeal from a judgment of acquittal." Jackson v. Virginia, 443 U.S. 307, 317 n.10, *reh'g denied*, 440 U.S. 890 (1979).

150. *See infra* text accompanying notes 166–96.

151. United States v. Scott, 437 U.S. 82, 92 (1978).

152. Oregon v. Kennedy, 456 U.S. 667, 672 (1982). *See infra* text accompanying notes 167–69.

153. Arizona v. Washington, 434 U.S. 497, 508–09 (1978) (*citing* United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)).

154. Oregon v. Kennedy, 456 U.S. 667, 672 (1982). "Manifest necessity" can exist even if prosecutorial error causes the retrial. *See* Illinois v. Somerville, 410 U.S. 458, 459–60, 468–69 (1973) (defective indictment), *aff'd*, Crist v. Bretz, 437 U.S. 28 (1978).

155. *See* United States v. Jorn, 400 U.S. 470, 482–87 (1970) (plurality opinion) (judge must consider alternatives to discharging the jury). *But see* Gori v. United States, 367 U.S. 364, 365, 367–70, *reh'g denied*, 368 U.S. 870 (1961) (no abuse of judge's discretion if the judge is seeking to act in the defendant's best interest).

156. 437 U.S. 82 (1977).

157. *Id.* at 94.

have found no pre-judgment double jeopardy protection, since the common-law pleas of *autrefois acquit* and *autrefois convict* protected a defendant from successive trials only if the first trial had ended in a determination of guilt or innocence.[158] Conversely, the Court might have read the literal language of the double jeopardy clause to preclude all duplicative proceedings.[159] Thus, history did not dictate the Court's actual approach, which is to recognize the "defendant's 'valued right to have his trial completed by a particular tribunal' "[160] because the right has "roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice."[161]

Nevertheless, the Court's approach to mistrials and dismissals seems generally consistent with the functions of the double jeopardy clause. In the first of the three pre-judgment situations, the defendant still has an interest in avoiding the "anxiety, expense and delay" that multiple prosecutions produce.[162] However, the defendant has deprived the state of one "full" proceeding.[163] In addition, since the defendant was the one who chose to end the proceedings, the prosecution was presumably willing to have the matter decided in one proceeding, lessening the danger that the state is, in fact, attempting to "wear down" an innocent defendant. In contrast, when the prosecution requests a mistrial or a judge declares a mistrial over the defendant's objection, a double jeopardy bar to retrial exists because the state (as represented by the prosecutor or judge) may be prolonging the proceedings to create "a more favorable opportunity to convict" instead of merely seeking one complete opportunity to convict.[164] However, the state may want a retrial for purposes other than wearing down the defendant; therefore, the state can overcome the double jeopardy bar by showing manifest necessity.

In two recent cases, the Court's interpretation of the extent to which the clause protects a defendant from prosecution after declaration of a mistrial was inconsistent with the functions of the clause. In the first case, *Oregon v. Kennedy*,[165] the defendant had requested and received a mistrial after the prosecution allegedly committed prejudicial error by asking a witness if the defendant was "a crook."[166] Language in several of the Court's previous cases suggested that, when the prosecution engages in "overreaching"[167] or "harassment,"[168] an exception exists to the rule that a mistrial declared at the defendant's request has no double jeopardy

158. *See supra* note 89.

159. *See supra* text accompanying note 1.

160. Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689, *reh'g denied*, 337 U.S. 921 (1949)).

161. Crist v. Bretz, 437 U.S. 28, 36 (1978). The Court's actual approach may be historically inaccurate because it relies on *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), which was not a double jeopardy case. Findlater, *supra* note 39, at 709–10.

162. United States v. Dinitz, 424 U.S. 600, 610 (1976).

163. *See supra* text accompanying note 140.

164. Arizona v. Washington, 434 U.S. 497, 508–09 n.25 (1978) (*quoting* Downum v. United States, 372 U.S. 734, 736 (1963)).

165. 456 U.S. 667 (1982).

166. *Id.* at 669.

167. United States v. Dinitz, 424 U.S. 600, 611 (1976); Downum v. United States, 372 U.S. 734, 736 (1963).

168. United States v. Jorn, 400 U.S. 470 (1971) (plurality opinion).

effect. However, the *Kennedy* Court held that a prosecutor's conduct would not bar retrial unless "intended to provoke the defendant into moving for a mistrial."[169]

The Court's standard does not adequately protect double jeopardy interests. The Court correctly noted that the defendant obviously has little real choice to continue a trial when the prosecution is intent on forcing the defendant to declare a mistrial.[170] However, other forms of harassment or overreaching can also leave the defendant with little choice. For example, the prosecution may be interested solely in subjecting the defendant to the harassment of trial or may be intent on ensuring a conviction (but not a mistrial) through unfairly prejudicial conduct.[171] Also, as a practical matter, "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an attempt simply to prejudice the defendant."[172]

Instead of focusing on the functions of the double jeopardy clause, the *Kennedy* Court applied the intent standard as it generally applies in cases involving prosecutorial misconduct,[173] declaring that an "overreaching" standard would be too amorphous to apply.[174] However, Professor Steven Reiss has suggested that a non-intent standard based upon "plain error" would be concrete enough to prevent a "windfall" to the defendant from "prosecutorial mistakes of a strategic or tactical nature."[175] A plain error standard is also logically appealing because plain errors in the evidentiary context do not have to be raised by the defendant.[176] The error is of such magnitude that the defendant's failure to preserve an objection was obviously not a strategic choice. Similarly, a court should not treat a defendant's mistrial request provoked by plain errors in the conduct of a trial as a typical request for a mistrial, because in the former case the defendant will also have had little choice. Use of a plain error standard would safeguard the defendant's double jeopardy interests better than the Court's "intent" standard.

The facts of the second case, *Richardson v. United States*,[177] implicated several double jeopardy doctrines. In *Richardson*, a jury acquitted the defendant of one count of distributing a controlled substance but could not come to a verdict on the other two counts in the indictment. Because of the jury's inability to agree on a verdict, the trial court declared a mistrial on the two remaining counts and scheduled a retrial.[178] The defendant moved for a directed acquittal based on the legal insufficiency of the government's evidence, but the trial court denied the motion.[179]

The Court initially found that it had jurisdiction to hear the defendant's appeal of the denial of his motion despite the final judgment requirement of 28 U.S.C.

169. Oregon v. Kennedy, 456 U.S. 667, 679 (1982).

170. *Id.* at 673; Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1424–25 (1987).

171. Oregon v. Kennedy, 456 U.S. 667, 689 (1982) (Stevens, J., concurring).

172. *Id.* at 688 (Stevens, J., concurring).

173. *See generally* Reiss, *supra* note 170, at 1368–1429.

174. Oregon v. Kennedy, 456 U.S. 667, 674 (1982).

175. Reiss, *supra* note 170, at 1472–73.

176. *See* FED R. EVID. 103(d); FED. R. CRIM. P. 52(b).

177. 468 U.S. 317 (1984).

178. *Id.* at 318–19.

179. *Id.* at 319.

§ 1291, relying on *Abney v. United States*.[180] The *Abney* Court had held that a "colorable"[181] double jeopardy claim could be an appealable collateral order even in the absence of a final judgment because, without immediate review, the double jeopardy claim that the state could not retry the defendant might be irretrievably lost.[182]

The Court then turned to the merits of the defendant's claim. The defendant claimed that *Burks v. United States*[183] required immediate appellate review of his motion for acquittal. *Burks* had held that an appellate reversal of a conviction for legal insufficiency of the evidence was the equivalent of an acquittal, and, therefore, barred retrial.[184]

The Court distinguished *Burks* on the ground that the reversal in *Burks* occurred after a final judgment.[185] From a functional standpoint, this does not seem to be a valid distinction. Even though the defendant has not actually been acquitted, retrial of a defendant who is entitled to an acquittal at the trial court level will not serve a valid state prosecutorial interest. "When the prosecution has failed to present constitutionally sufficient evidence, it cannot complain of unfairness in being denied a second chance, and the interests in finality, shared by the defendant and society, strongly outweigh the reasons for a retrial."[186] In *Richardson*, retrial could have subjected the defendant to further delay, expense, anxiety, and embarrassment for no valid state reason.

The Court also rejected the defendant's double jeopardy claim because a hung jury is not "the equivalent of an acquittal." The judge's declaration of a mistrial was not "an event which terminated jeopardy."[187] The Court cited a long line of cases that had allowed retrial after a hung jury to buttress its contention that a hung jury does not terminate the original jeopardy.[188] In short, the Court justified retrial "by pretending that it was not really a new trial at all but was instead simply a 'continuation' of the original proceeding."[189]

The hung jury cases, however, were "quite beside the point."[190] The defendant objected to the second trial not because the first trial ended in a hung jury but because

180. 431 U.S. 651 (1977); Richardson v. United States, 468 U.S. 317, 319 (1984).

181. United States v. MacDonald, 435 U.S. 850, 862 (1978) (interpreting Abney v. United States, 431 U.S. 651 (1977)).

182. Abney v. United States, 431 U.S. 651, 662 (1977). *See also* Flanagan v. United States, 465 U.S. 259, 266 (1984).

183. 437 U.S. 1 (1978).

184. *Id.* at 10–11. *See supra* note 134.

185. Richardson v. United States, 468 U.S. 317, 320 (1984).

186. *Id.* at 330 (Brennan, J., dissenting in part). The defendant's "wearing down" interest, however, would only be implicated if a court could not review the defendant's motion for judgment of acquittal after a final judgment in the second trial. The question then becomes whether a court can review a defendant's motion from the first trial after the second trial. For a discussion of this issue, see United States v. Richardson, 702 F.2d 1079, 1081–82 (D.C. Cir. 1983), *rev'd on other grounds*, 468 U.S. 317 (1984) (court can review); *id.* at 1092–94 (Scalia, J., dissenting) (court cannot review).

187. Richardson v. United States, 468 U.S. 317, 325 (1984).

188. *Id.* at 323–25.

189. *Id.* at 329 (Brennan, J., dissenting in part).

190. *Id.* at 330 (Brennan, J., dissenting in part).

the defendant felt entitled to a directed acquittal based on legal insufficiency of the evidence.

The Court's result still might have been correct if jeopardy actually is "continuous" in the absence of an acquittal. However, even without an acquittal, a new trial results in duplicative proceedings that interfere with the defendant's finality interest. "An entirely new trial on the same indictment before a new jury, presumably with much of the same evidence, will plainly subject the defendant to the kinds of risks and costs that the Double Jeopardy Clause was intended to prohibit."[191]

After *Richardson*, the state can expose a defendant to the stress of a second trial after the state no longer has a valid prosecutorial interest because, according to the Court, appeals like the defendant's no longer present a colorable double jeopardy claim.[192] The Court seemed reconciled to this result because of the idea, lurking in the background in *Richardson*, that the government has an interest in preventing the use of *Burks*-type appeals simply as a means of delay.[193] The *Abney* Court, however, noted that "[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy."[194] Also, even though a defendant cannot appeal a denial of a motion for judgment of acquittal after declaration of a mistrial, the defendant can presumably still appeal on the basis that the jury was not "genuinely deadlocked."[195] In short, the possibility of delay does not create a pressing need to interfere with a defendant's finality interest, since the judicial system has a mechanism for preventing delay and delay is possible anyway through other types of permissible appeals.

The Court's approach to acquittals and other rulings ending a trial without a conviction generally serves the functions of the double jeopardy clause. However, the Court's approach in *Richardson*, which included citing Justice Holmes' aphorism that "a page of history is worth a volume of logic,"[196] did not prevent it from needlessly creating a doctrine at odds with a defendant's double jeopardy interests. *Richardson* is thus a prime example of the incompatibility of the Court's reliance on history with a functional analysis of the double jeopardy clause.

C. *The Double Jeopardy Implications of Resentencing*

The resentencing issue arises after a defendant has been retried and convicted. The Court has interpreted the double jeopardy clause to contain a protection against reprosecution for the same offense;[197] however, the Court has also long recognized

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191. *Id.* at 328 (Brennan, J., dissenting in part).

192. *Id.* at 326 n.6.

193. *See id.* ("there is little need to interpose the delay of appellate review before a second trial can begin").

194. Abney v. United States, 431 U.S. 651, 662 n.8 (1977). *See* United States v. Hines, 689 F.2d 934, 937 (10th Cir. 1982); United States v. Leppo, 634 F.2d 101, 105 (3d Cir. 1980) (immediate appellate review of double jeopardy claim not necessary if the district court has made a written finding that the defendant's motion is frivolous).

195. *See* Arizona v. Washington, 434 U.S. 497, 509, 514 (1978). Note that *Washington* involved a habeas corpus proceeding, not the direct review of a collateral order. *Id.* at 498. *But see* Richardson v. United States, 468 U.S. 317, 335 (1984) (Stevens, J., dissenting) (appeal asserting that jury was not genuinely deadlocked might raise a colorable claim).

196. Richardson v. United States, 468 U.S. 317, 325–26 (1984).

197. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

an exception, holding that the state may reprosecute a defendant after conviction for the same offense if the defendant has successfully appealed his conviction.[198] The effect of a reversal of conviction is thus analogous to the effect of a mid-trial termination of a trial by the defendant, both of which are outweighed by the state's prosecutorial interest. Although one could argue that the state is to blame for the second proceeding because it committed reversible error, as a matter of "practical necessity"[199] "it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceeding leading to conviction."[200]

In *North Carolina v. Pearce*,[201] the Court held that a court could give a successful appellant a harsher sentence after his second trial without violating the double jeopardy clause.[202] The decision seemed to conflict with the Court's earlier decision in *Green v. United States*,[203] which had recognized the concept of an "implied acquittal." In *Green*, the judge had instructed the jury at the defendant's first trial that, based on the evidence presented, it could find the defendant guilty of either first degree murder or the lesser offense of second degree murder.[204] The jury found the defendant guilty of second degree murder. An appellate court reversed the defendant's conviction and remanded for a new trial at which the jury convicted the defendant of first degree murder. The Court found that the first jury's verdict of guilt on the second degree murder charge functioned as an "implicit acquittal" of the greater charge of first degree murder.[205] Thus, when the trier of fact has the choice of a greater and lesser-included offense and chooses the lesser, the choice acts as an an implied acquittal of the greater offense. Therefore, one could argue, citing *Green*,

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198. United States v. Ball, 163 U.S. 662, 672 (1896). *See also* Montana v. Hall, 107 S. Ct. 1825, 1826 (1987) (per curiam); North Carolina v. Pearce, 395 U.S. 711, 720–21 (1969); Green v. United States, 355 U.S. 184, 189 (1957). Burks v. United States, 437 U.S. 1 (1978), created an exception to the exception. *See supra* text accompanying notes 183–84. Logically, the constitution would also bar retrial if a defendant's conviction were reversed for prosecutorial misconduct that would have barred retrial under the standard enunciated in *Oregon v. Kennedy*, *see supra* text accompanying notes 167–69, although the Court appears to have rejected that idea in *Kennedy* itself, *see* Oregon v. Kennedy, 456 U.S. 667, 676 n.6 (1982); Reiss, *supra* note 170, at 1428 n.303.

199. Reiss, *supra* note 170, at 1422.

200. United States v. Tateo, 377 U.S. 463, 466 (1964).

201. 395 U.S. 711 (1969).

202. *Id.* at 720–21. However, a harsher sentence may implicate the due process clause. *Id.* at 725. Due process requires that the sentencing judge give reasons for a harsher sentence to ensure that the judge is not acting out of vindictiveness towards the defendant for appealing his first conviction. *Id.* at 726. No vindictiveness presumption arises during the resentencing if a jury had sentenced the defendant at the first trial, Texas v. McCullough, 475 U.S. 134, 139–40 (1986), or if a jury is the sentencer at the second trial, Chaffin v. Stynchcombe, 412 U.S. 17, 26–28 (1973).

Due process also protects a defendant from a prosecutor's vindictiveness in charging. In Blackledge v. Perry, 417 U.S. 21 (1974), the Court found that charging a defendant with a more serious crime after the defendant removed the case from North Carolina's state district court to the state superior court raised a presumption of vindictiveness on the part of the prosecutor. *Id.* at 22–23, 28–29. *See also* Thigpen v. Roberts, 468 U.S. 27, 30, 32 n.6 (1984); Reiss, *supra* note 170, at 1384.

The Court did not address the issue of vindictive charging in Montana v. Hall, 107 S. Ct. 1825 (1987) (per curiam). In *Hall*, the defendant had been convicted of felonious sexual assault after an appellate court reversed his conviction for incest. *Id.* at 1825–26. The Court, apparently assuming that the two crimes were the same offense for double jeopardy purposes, found that the case fell "squarely within the rule that retrial is permissible after a conviction is reversed on appeal." *Id.* at 1827.

203. 355 U.S. 184 (1957).

204. *Id.* at 189–90.

205. *Id.* at 190.

that a defendant-appellant's first sentence is an implied acquittal of a possibly greater sentence because "the two situations [*Green* and *Pearce*] cannot meaningfully be distinguished . . . . In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum."[206] Nevertheless, the *Pearce* Court rejected the implicit acquittal argument, finding that, after reversal, "the slate" had been "wiped clean."[207]

The Court explained what it had meant in *Pearce*, in *United States v. DiFrancesco*,[208] and in *Bullington v. Missouri*.[209] In *DiFrancesco*, the Court upheld the constitutionality of 18 U.S.C. § 3576, which allowed the government to appeal the original sentence imposed upon a "dangerous special offender."[210] In *Bullington*, the Court found that the double jeopardy clause can prevent a court from increasing a defendant's sentence to the death penalty after the defendant's second conviction.[211] In *DiFrancesco*, the Court said the situations in *Green* and *Pearce* were different because "*[h]istorically*, the pronouncement of sentence has never carried the finality that attaches to an acquittal."[212] Also, "the defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that is already behind him" when the time comes to pronounce sentence.[213] Moreover, the sentencing procedure is not part of the fact-finding process; it is "purely a judicial determination."[214]

In *Bullington*, the Court distinguished *DiFrancesco*, finding that a capital punishment sentencing proceeding at which the jury imposed only a prison sentence after balancing aggravating and mitigating circumstances was analogous to a jury's fact-finding on issues of guilt or innocence at a trial. The unique fact-finding nature of the capital sentencing proceeding in *Bullington* meant that a life sentence implicitly acquitted the defendant of the death penalty.[215]

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206. North Carolina v. Pearce, 395 U.S. 711, 745–46 (1969) (Harlan, J., dissenting). *See also* Green v. United States, 355 U.S. 184, 213–14 (1957) (Frankfurter, J., dissenting).

207. North Carolina v. Pearce, 395 U.S. 711, 721 (1969).

208. 449 U.S. 117 (1980).

209. 451 U.S. 430 (1981).

210. United States v. DiFrancesco, 449 U.S. 117, 132, 137 (1980). Congress repealed § 3576 in 1986 and replaced it with 18 U.S.C. § 3742(b) (Supp. 1986), in which the appeal right is not limited to particular classes of offense or offenders.

211. Bullington v. Missouri, 451 U.S. 430, 443–45 (1981).

212. United States v. DiFrancesco, 449 U.S. 117, 133 (1980) (emphasis added).

213. *Id.* at 136.

214. *Id.* at 137.

215. Bullington v. Missouri, 451 U.S. 430, 439 (1981). *See also* Arizona v. Rumsey, 467 U.S. 203, 209 (1984) (same analysis applies when a judge is the sentencer). *But cf.* Spaziano v. Florida, 468 U.S 447 (1984). In *Spaziano*, the jury "recommended" a sentence of life imprisonment after weighing the aggravating and mitigating circumstances. Nevertheless, the trial court sentenced the defendant to death. *Id.* at 451–52. Although the Court alluded to the fact that, under the double jeopardy clause, repeated trials or trial-like proceedings can wear down an innocent defendant, the Court upheld the second sentence on the ground that the sixth amendment right to a jury trial does not include a right to jury sentencing in a capital case, *id.* at 457–59, which was irrelevant to an issue the Court did not address: whether the second sentencing procedure interfered with the defendant's finality interest.

The finality implications of capital sentencing procedures may differ from the finality accorded an acquittal because of the differences between sentencing and the determination of guilt or innocence. However, the sentencing procedure does not have to be identical to a factual determination of guilt or innocence to fall within the *Bullington* exception, as the Court indicated in Poland v. Arizona, 476 U.S. 147 (1986). In *Poland*, an appellate court had found insufficient evidence to support the aggravating circumstance that the sentencing court had relied upon. On remand, the trial court

Thus, the Court's focus when determining whether a sentencing procedure equals an acquittal for double jeopardy purposes is on the similarity of the sentencing procedure to jury fact-finding at trial. However, the amount of fact-finding involved in a sentencing proceeding affects only the interest in preventing the state from wearing down an innocent (or, in this context, a less culpable) defendant. The amount of fact-finding has but a minimal relationship to the sentencing proceeding's effect on the defendant's finality interest. One of the primary sources of trial-related anxiety and uncertainty is the risk of punishment.[216] The possibility of an increase in punishment means that even a convicted defendant who knows he will not be formally retried is not free from anxiety. An even clearer example of interference with the defendent's finality interest is the case of "a defendant who successfully vacates a conviction and is then retried and convicted after he has fully served the sentence first imposed."[217]

The Court could have interpreted *DiFrancesco* narrowly. The state ordinarily has no interest in an increased sentence after reversal of a conviction. Usually, but for the defendant's appeal, the state would never question the first sentence. Nonetheless, in some cases the state, even though it has obtained a conviction, may have an interest in appealing a sentence because the sentence violates the law or is an abuse of the judge's discretion. The Court might interpret *DiFrancesco* to stand for the proposition that, even though a sentence is an implicit acquittal, it differs from other acquittals in that an appellate court may review the former for legal error or abuse of discretion.

Recently, however, in *Pennsylvania v. Goldhammer*,[218] the Court seemed to expand *DiFrancesco*'s reach in non-capital cases beyond that proposition. The trial court in *Goldhammer* convicted the defendant on fifty-six counts of theft and sentenced the defendant on one count.[219] The prosecution did not appeal that sentence.[220] The defendant appealed and the trial court reversed thirty-four of the

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again sentenced the defendant to death, but on the basis of a different aggravating circumstance. *Id.* at 149–50. The defendant argued that the appellate court's decision was the equivalent of a *Burks* acquittal, *see supra* text accompanying notes 183–84, but the Court upheld the second sentence, finding that the aggravating circumstance was not the equivalent of an element of a crime because "under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.* require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.* preclude the death penalty)." *Id.* at 156.

216. United States v. DiFrancesco, 449 U.S. 117, 149 (1980) (Brennan, J., dissenting). The Court's emphasis on actual fact-finding proceedings rather than the fear of punishment may imply that an appellate court can review a judgment of acquittal after a jury verdict of guilty (entry of a judgment of acquittal is permissible in that situation under FED. R. CRIM. P. 29(c)) because reversal will merely result in the reinstatement of the jury's verdict. The Court has neither rejected nor endorsed this proposition. *See* United States v. Scott, 437 U.S. 82, 91 n.7 (1978). *Cf.* United States v. Wilson, 420 U.S. 332, 333, 352–53 (1978) (permitting retrial where the judge's action was the dismissal of the indictment rather than acquittal).

217. North Carolina v. Pearce, 395 U.S. 711, 749 n.7 (1969) (Harlan, J., dissenting). *See* Fitzgerald v. United States, 472 A.2d 52 (D.C. App. 1984), in which, after reversal of the defendant's first conviction, the Court upheld a second conviction, despite the fact that the defendant had already been released on parole at the time of the reversal. *Id.* at 53–54. The defendant might not have been subject to a second prison sentence, but the mere fact of conviction itself created "substantial collateral consequences." *Id. See also* Ball v. United States, 470 U.S. 856, 864–65 (1985) (collateral consequences include stigma and the risk of falling under repeat offender statutes); Sibron v. New York, 392 U.S. 40, 53–58 (1968).

218. 474 U.S. 28 (1985) (per curiam).

219. *Id.* at 29.

220. *Id.* at 32 (Stevens, J., dissenting).

defendant's convictions on statute of limitations grounds, including the one upon which the trial court had sentenced the defendant. The state then sought to have the case remanded for resentencing on the twenty-two counts for which the defendant had received a suspended sentence.[221] The Court citing *DiFrancesco*, remanded the case for a determination of whether state law in effect at the time allowed prosecutorial appeals.[222] The case indicates that if the right to appeal did exist, the resentencing would have been constitutionally valid under *DiFrancesco*.[223]

However, unlike the government in *DiFrancesco*, the state in *Goldhammer* did not allege that the trial court's original sentencing was an abuse of discretion.[224] In *Goldhammer*, the state felt deprived of one fair and full opportunity only after appellate reversal of a separate conviction. The *DiFrancesco* Court had found the dangerous special offender statute to be "narrowly focused" on the problem of trial judges' abusing their sentencing power in cases involving "organized crime management personnel."[225] Although my primary disagreement with *Goldhammer* is my opinion that sentences are the equivalent of implied acquittals, even on the Court's own terms the *Goldhammer* decision seems inconsistent with protection of the state's interest in prosecution. The Court now seems to allow resentencing to not only serve as a check upon a trial court's abuse of discretion, but to also serve as a device that can be used intermittently to insure that a convicted defendant does not go totally unpunished, even if the trial court did not arbitrarily deprive the state of one full opportunity to impose a maximum sentence.[226]

The more fundamental problem with the Court's approach to resentencing is that it does not consider the values that the double jeopardy clause protects. Consequently, the Court fails to recognize that resentencing affects a defendant's finality interest.

V. Conclusion

The Supreme Court's historical approach to double jeopardy questions lessens the double jeopardy clause's usefulness as a constitutional restraint on the government's ability to accuse persons of crimes. In addition, the historical approach's

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221. *Id.* at 29 (opinion of the Court).

222. *Id.* at 29–31.

223. *Id.* at 29–30.

224. *See* United States v. DiFrancesco, 449 U.S. 117, 125 (1980).

225. *Id.* at 142–43.

226. One could argue that the entire multi-count conviction in *Goldhammer* constituted one "sentencing package," meaning that reversal of one count would necessarily affect the sentence on other counts. *See* United States v. Shue, 825 F.2d 1111, 1114 (7th Cir.), *cert. denied*, 108 S. Ct. 351 (1987). However, this implies that if a defendant challenges a conviction for which he had received a suspended sentence in a multi-count "package" (as a defendant may well do to avoid "collateral consequences," *see supra* note 217) and the conviction is reversed, then the total sentence for the "package" should be reduced accordingly. The amount of the reduction could easily be determined at the federal level through use of the United States Sentencing Commission's elaborate system of calculating the appropriate total sentence for multi-count convictions. *See* Notice of Revisions to Commentary to the Sentencing Guidelines and Policy Statements of the United States Courts, 52 Fed. Reg. 44,674, 44,721–25 (1987).

The prosecution's actions in *Goldhammer* would also seem to create a due process vindictiveness issue if the defendant received a greater sentence on remand. *See supra* note 202; United States v. Shue, 825 F.2d 1111, 1115–16 (7th Cir.), *cert. denied*, 108 S. Ct. 351 (1987).

inconsistency with the Court's approach to other fundamental rights suggests that the the double jeopardy clause is less meaningful than other constitutional guarantees.

The Court's approach also continues to produce confused decisions. The presence of historical ambiguity in this context and changes in the criminal justice system since 1791, combined with the adversarial nature of "law-office" history,[227] means that a historical analysis can often be used to support different conclusions and can lead to different lines of precedent. Therefore, the Court must often base its double jeopardy decisions on something besides clear, unambiguous precedent. However, since the Court prefers "history" to "logic,"[228] it seldom perceives which aspects of its double jeopardy precedents are dispositive in particular cases. Consequently, the Court's choice of which precedent to apply in such areas as overlapping statutes, retrial after denial of a motion for judgment of acquittal, and resentencing may be influenced, not by a careful analysis of the clause's function, but by an unstated preference for an efficient judicial system or an unstated lack of sympathy for the accused criminals who raise double jeopardy claims,[229] both of which may be irrelevant to a proper interpretation of the clause. The Court's mechanical application of precedent in recent cases like *Garrett v. United States*,[230] *Richardson v. United States*,[231] and *Pennsylvania v. Goldhammer*[232] resulted in a narrowing of double jeopardy protections without the Court acknowledging the fact.

The Court should replace its historical analysis with a functional analysis. Although a functional approach may not make double jeopardy questions easier to resolve, particularly when a court must balance the defendants' interests against the state's prosecutorial interest, a functional approach will enable the Court to realize when actions by the state interfere with the double jeopardy clause's protections.

"The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society. . . . If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance."[233] A functional approach would be more consistent with the Court's interpretation of other fundamental rights and would enable the double jeopardy clause to serve as a meaningful check on a form of governmental oppression.

Donald Eric Burton

227. Tushnet, *supra* note 38, at 793.
228. Richardson v. United States, 468 U.S. 317, 325–26 (1984). *See supra* text accompanying note 196.
229. *See* McKay, *supra* note 2, at 12 n.87.
230. 471 U.S. 773, *reh'g denied*, 473 U.S. 927 (1985). *See supra* text accompanying notes 110–30.
231. 468 U.S. 317 (1984). *See supra* text accompanying notes 173–96.
232. 474 U.S. 28 (1985) (per curiam). *See supra* text accompanying notes 218–26.
233. Green v. United States, 355 U.S. 184, 198 (1957).